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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. **396**

**PLUMBERS, STEAMFITTERS, REFRIGERATION, PETRO-
LEUM FITTERS, AND APPRENTICES OF LOCAL NO.
298, A. F. of L., and BUILDING AND CONSTRUC-
TION TRADES COUNCIL OF GREEN BAY,
WISCONSIN, AND VICINITY,**
Petitioners,

vs.

**COUNTY OF DOOR, a Municipal Corporation, and
ARNOLD G. ZAHN and THEODORE OUDENHOVEN,**
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

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Petitioners pray that a Writ of Certiorari-issue to review the final judgment of the Wisconsin Supreme Court entered in the above entitled case on June 26, 1958.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Circuit Court for Door County (Tr. 1-3)¹ is unreported and is printed in Appendix A, *infra*, pp. 9-11. The opinion of the Wisconsin Supreme Court (Tr. 39-56) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920, and is reprinted as Appendix B, *infra*, pp. 12-26.

¹ "Tr." refers to the certified transcript filed herein.

JURISDICTION.

The Wisconsin Supreme Court on May 6, 1958, entered a judgment affirming the issuance of a permanent injunction (App. C, *infra*, p. 27) against peaceful picketing being conducted by Petitioners (Tr. 39). A timely motion for rehearing was filed on May 19, 1958, and denied on June 26, 1958 (Tr. 57). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTION PRESENTED.

Whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the county government and two private contractors, in view of the fact that the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2, of the United States Constitution. Article I, Section 8, in material part, provides:

"The Congress shall have power . . . to regulate commerce . . . among the several states . . . And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States; or in any department or officer thereof."

Article VI, Section 2, in material part, provides:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; . . .

shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

STATEMENT.

Petitioner Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local 298, A. F. of L., is a labor organization having offices in Green Bay, Wisconsin (Tr. 9). Petitioner Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity is an organization composed of representatives of building trades unions in and about Green Bay, Wisconsin (Tr. 9). Petitioners are herein collectively referred to as the "Union."

Respondent County of Door (referred to as the "County") is a municipal corporation (Tr. 8). Respondent Arnold G. Zahn (referred to as "Zahn") is a plumbing contractor residing in Sturgeon Bay, Wisconsin (Tr. 8). Respondent Theodore Oudenhoven (referred to as "Oudenhoven") is a general contractor residing in Kaukauna, Wisconsin (Tr. 8-9).

In March, 1957, the County entered into contracts with Zahn and Oudenhoven, among others, for the performance of work in connection with the construction of an addition to the County's courthouse (Tr. 9). Out-of-state materials valued at \$125,000 were used in the construction of the courthouse addition (Tr. 32).

Commencing on June 26, 1957, the Union engaged in peaceful picketing to advertise the non-union status of Zahn's employees (Tr. 10). Employees of union contractors working on the project refused to cross the picket line (Tr. 10).

The District Attorney of the County filed, in the Circuit Court for Door County, a joint complaint on behalf of the

County, Zahn and Oudenhoven (Tr. 3-4) alleging that the Union's picketing was illegal because no labor dispute existed between Zahn and his employees (Tr. 5-6).² Answering, the Union denied the material allegations of the complaint (Tr. 6-7) and affirmatively alleged that, pursuant to the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Sec. 151 *et seq.* (referred to as the "National Act"), exclusive jurisdiction over the subject matter of the controversy was vested in the National Labor Relations Board (referred to as the "Labor Board") (Tr. 7-8).

This defense was rejected by the trial court (Tr. 23) which held that the picketing was unlawful under Section 6 of the Wisconsin Employment Relations Act [Wis. Stats., Sec. 111.06 (2) (b)] in that the Union's purpose was to compel Zahn to interfere with his employees' right of self-organization (Tr. 10-11).³ A temporary restraining order issued on July 27, 1957 (Tr. 12), was supplanted by a permanent injunction on October 23, 1957 (Tr. 14).

² Wis. Stats., Sec. 103.535, provides:

"It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives."

Wis. Stats., Sec. 103.62 (3), provides:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

³ The complaint fails to allege any unlawful purpose (Tr. 3-6).

On appeal to the Wisconsin Supreme Court, the Union sought a reversal of the unlawful purpose finding and again asserted that exclusive jurisdiction over the controversy was vested in the Labor Board.

The trial court's finding that the Union's peaceful picketing violated the Wisconsin Employment Relations Act was affirmed (Tr. 42-44; App. B, pp. 14-16). The Wisconsin Supreme Court considered but rejected the contention that exclusive jurisdiction over the controversy was vested in the Labor Board (Tr. 44-49; App. B, pp. 17-21).

The majority below disagreed with the holding of the Labor Board and the United States Court of Appeals for the Third Circuit [*Peter D. Furness*, 117 N. E. R. B. 437, *enfd* 254 F. 2d 221 (C. A. 3)], which sustained the right of a county government to invoke the procedures of the National Act against union picketing violating the National Act (Tr. 47; App. B, p. 19).

One member of the court, concurring, acknowledged the binding effect of the Labor Board's ruling (Tr. 51; App. B, pp. 22-23); but held that peaceful picketing, in the course of disputes affecting interstate commerce, is not completely regulated under the National Act (Tr. 52-53; App. B, pp. 22-23). Reasoning from this premise, the concurring justice concluded that peaceful picketing which affects governmental construction is subject to restraint pursuant to an application of state law notwithstanding the fact that the dispute affects interstate commerce (Tr. 52-53; App. B, pp. 23-24).

One member of the court, dissenting, concluded that the familiar rules of pre-emption barred state action for "the picketing involved in this action, is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (Tr. 55; App. B, p. 26).

HOW FEDERAL QUESTION IS PRESENTED.

The Union's answer affirmatively alleged that exclusive jurisdiction over the controversy was vested in the Labor Board (Tr. 7-8). This contention was considered and rejected by the trial court (Tr. 2-3) and the Wisconsin Supreme Court (Tr. 44-49).

REASONS FOR GRANTING THE WRIT.

1. Contrary to the decisions of this Court in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, and *Garner v. Teamsters Union*, 346 U. S. 485, the court below asserted jurisdiction to restrain peaceful picketing occurring in the course of a dispute affecting interstate commerce. Here, as in *Garner*, it is claimed that peaceful picketing is subject to state regulation on the theory that the Union, through its picketing, seeks to accomplish an objective unlawful under the state's labor relations act. And, as in *Local Union 25*, state jurisdiction over otherwise pre-empted matters is claimed on the theory that the complaining party is not an "employer" within the meaning of Section 2 (2) of the National Act.⁴ The affirmance in *Garner* and reversal in *Local Union 25* resolved both claims in favor of uniform federal regulation and are decisive in this case.

As a direct consequence of this Court's decision in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, the Labor Board, reversing its prior rulings, has held that state and federal governmental agencies and subdivisions are "persons" entitled to invoke the protections of the National Act. *Peter D. Furness*, 117 NLRB 437, *enf'd*,

⁴ Unlike *Local Union 25*, where the only plaintiff was a railroad, Zahn and Oudenhoven, co-plaintiffs below, are "employers" within the meaning of the National Act.

254 F. 2d 221 (C. A. 3); *Freeman Construction Company*, 120 NLRB No. 106. See also: 22nd Annual Report (NLRB) 99-100. The court below acknowledged the significance of these decisions to the Union's claim of pre-emption but held that the Labor Board and Court of Appeals for the Third Circuit have erred in their construction of the National Act (Tr. 46-47; App. B, p. 19).⁵ On this basis, the court below concluded that state jurisdiction existed. Thus, the present case presents a head-on conflict between federal and state authority. See: *Weber v. Anheuser-Busch*, 348 U. S. 468, 480.

2. Similar conflicts would exist even if the reasoning of concurring member of the court below were accepted. The concurring opinion assumes, contrary to *Garner v. Teamsters Union*, 346 U. S. 485, 499-500, that peaceful picketing in the course of disputes affecting commerce is not totally regulated under the National Act (Tr. 52-53; App. B, p. 24). Moreover, the contention that activities regulated under the National Act are subject to state restraint, where state agencies are involved (Tr. 51-52; App. B, pp. 23-24), was urged and rejected almost ten years ago. *Wisconsin E. R. Board v. Milwaukee G. L. Co.*, 258 Wis. 1, 8, 44 N. W. 2d 547, 551, *rev'd sub nom.*, *Amalgamated Assoc. v. Wisconsin Board*, 340 U. S. 383. Cf. *California v. Taylor*, 353 U. S. 553, 560.

3. In addition to creating needless conflicts between federal and state authority, the judgment below has ramifications national in scope. For example, if the holding below were to gain general acceptance, all labor disputes affecting interstate highway construction would be subject to

⁵ The definitional sections of the National Act and the Wisconsin Employment Relations Act are, in material part, identical; yet the court below envisioned no impediment to the right of a governmental subdivision to invoke the state labor relations act. Compare 29 U. S. C., Secs. 152 (1)-(2), with Wis Stats., Secs. 111.02 (1)-(2).

state regulation. State participation in urban redevelopment, public housing and dam construction projects further demonstrates the importance of this case.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX "A".

MEMORANDUM DECISION FROM THE BENCH.

(TRIAL COURT.)

(Formal Parts Omitted.)

The record in this case clearly establishes that there was no controversy between the plaintiff, Door County, the owner of the court house building to be constructed, and any of the subcontractors or any employees of Door County. The record is equally clear that there was no controversy between the general contractor, as employer, and his employees. The record is clear that there was no controversy between plaintiff Zahn, as employer and plumbing contractor, and either of his two employees.

I am constrained to find that at the time the picket line was established and one picket employed who carried a sign, which action was directed and initiated by Richard Garot, a business representative of the Plumbers, Steamfitters, Petroleum Fitters and Apprentices of Local Union 298, AFL-CIO, the union that Mr. Garot represented was not a representative of any employee and was not the bargaining agent so that they were a party to the contracts or the situation generally that could give rise to a labor dispute.

There being no labor dispute and no situation that could give rise to a labor dispute, the physical presence of the picket from the first time the first picket was placed and occupied a position on the sidewalk outside the court-house, and the second picket, was coercive action in itself and amounted to economic pressure and was designed to

cause a work stoppage, which did occur. Picketing is not confined to advertising the cause of a union, which they have a perfect right to do under the Fourteenth Amendment, I believe it is, or anyway the freedom of speech, guarantee under the Constitution. There being no labor dispute in this case, the picketing was unlawful picketing as prohibited by Sec. 103.535, Wisconsin Statutes.

The claim that this project was an engagement in interstate commerce because the greater part, in money, of the cost of materials and of the entire project was goods or material manufactured outside of the state, is without merit. I say that it is without merit for these reasons. (1) That by no concept or strained construction of the Interstate Commerce Clause can the construction of a building be called engaging in interstate commerce. (2) The plaintiff, Door County, who is aggrieved in this matter because of the work stoppage on the construction of their courthouse, which they are required under the law to construct, could not, by its very character, engage in interstate commerce. Regardless of the fact this undertaking and this project does not partake of the character of an interstate commerce undertaking, the state courts have jurisdiction to enforce their own statutes against any unlawful act. The Supreme Court of the United States has stated that Congress, in the enactment of the Taft-Hartley Law, did pre-empt certain fields of labor. However, in more recent decisions, the U. S. Supreme Court has made clear that the area of enforcement of the law where substantial rights of citizens of the state are affected by unlawful conduct, that state courts can act, that the legislature can speak and that state courts can enforce injunctions.

This picketing being unlawful, which I find to be the fact, did constitute a violation of the law and a violation of the statute and it is a proper subject of equitable relief.

It follows from what has been said that the temporary injunction will be issued, and a bond of \$2,000 to be furnished by the plaintiff, Door County, and filed with the Clerk of Circuit Court of Door County prior to the presentation to the Court and filing of the temporary injunction.

It is ordered that counsel for the plaintiffs prepare and submit to the Court and to opposing counsel formal written findings of fact and conclusions of law consistent with the memorandum decision rendered from the bench.

Dated: July 25, 1957.

APPENDIX "B".

OPINION OF THE COURT.

(WISCONSIN SUPREME COURT.)

(Formal Parts Omitted.)

Appeal from a judgment of the circuit court for Door County: Arold F. Murphy, Circuit Judge, presiding. Affirmed.

Action commenced by plaintiffs County of Door, a municipal corporation, Arnold Zahn and Theodore Oudenhoven against defendants Local 298 of the Plumbers and Steamfitters Union of Green Bay and Building and Construction Trades Council of Green Bay, Wisconsin and Vicinity, for an injunction restraining the defendants, their agents and officers, from picketing the job site at the Door County court house addition in the city of Sturgeon Bay, Wisconsin. From a judgment granting the injunction prayed for, defendants appeal.

Early in 1957 Door County asked for bids on the construction of an addition to the court house at Sturgeon Bay. They were reviewed by the Door County Property and Building Committee and contracts were let to the lowest responsible bidders. On March 1, 1957, the County entered into a general contract with Theodore Oudenhoven for \$267,711. The general contractor had a contract with the Fox River Valley Contractors Association, the Building Trades Employers Association of Green Bay and with the International Hod Carriers and Common Laborers Union.

The County contracted for the plumbing with Arnold G. Zahn of Sturgeon Bay whose three employees were non-

union. All the contractors on the job were union except Zahn.

Construction was begun and between June 26 and July 5, 1957, and between July 15 and 25, the defendant Union placed a picket on the sidewalk near the court house addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation, "Plumbers Local 298, A. F. of L., CIO." On the days the picket was there the union employees did not work and at the time of the trial the work had stopped completely.

The trial court found that no labor dispute existed between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of Sec. 103.62 (3), Stats.; that the picketing was violative of Secs. 103.535, 111.04 and 111.06 (2) (b), Stats., and granted the injunction.

Further facts will be stated in the opinion.

Martin, C. J. It was stipulated that the total cost of the court house addition was \$450,000, exclusive of the furniture; of that amount, 35% represented labor on the construction; 15% represented material purchased in Wisconsin; and 50% represented material manufactured outside of the State of Wisconsin. It is admitted that no labor dispute existed, as found by the trial court.

Defendants contend that the picketing was for the sole purpose of informing the union men and the public of the non-union condition. The evidence is practically undisputed that after Zahn entered into his contract, Richard Garot, business representative of Local 298, called on him and asked him to sign a contract with the union "or else there may be a little dispute on the Court House job." Zahn testified he attempted, apparently unsuccessfully, to

sublet his contract, and that the Union offered no solution to the work stoppage except that he join.

On cross-examination Garot testified:

“Q. It [the picketing] was also to stop work on the job as long as the non-union plumber contractor was there, wasn't it?

A. No, sir.

Q. Didn't you know that would be the effect of the picket?

A. I thought it might be but I didn't know. That's something nobody knows, I guess

The Court: When you testified before you said that it has been your experience that when a picket went on a job that the union men would stop work?

A. That's right.”

The trial court found that the picketing was coercive action in itself and amounted to economic pressure and was designed to cause a work stoppage; that it was not confined to advertising the cause of the Union.

In *Teamsters Union v. Vogt, Inc.* (on reargument, 1956), 270 Wis. 321a, 74 N. W. (2d) 749, this court held that the “peaceful picketing” carried on by the Union at the entrance to Vogt's gravel pit was for the purpose of coercing the employer to interfere with its employees in their right to join or refuse to join the Union, contrary to the provisions of sec. 111.06 (2) (b), Stats. and affirmed the granting of the injunction. On appeal (354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. [2d] 1347) the United States Supreme Court traced the history of the cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. In the course of that discussion the court, by Mr. Justice Frankfurter, stated at p. 289:

“Cases reached the Court in which a State had designed a remedy to meet a specific situation or to

accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' "

It stated that as time went on its "strong reliance on the particular facts in each case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy;" and that the reassessments of its views "were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation."

"This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy" (p. 293).

and quoted from the opinion of the Maine Supreme Court in *Pappas v. Stacey* (1955), 151 Me. 36, 116 Atl. (2d) 497, 500, where it was said:

"... there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during non-

compliance by the employees with the request of the union' " (p. 294).

Finally, it held that the policy of Wisconsin enforced by the prohibition of the Vogt picketing is a valid one.

See, also, Retail Fruit Union, AFL-CIO, v. NLRB (9th Cir. 1957), 249 Fed. (2d) 591.

It was a fair inference for the trial court to conclude from the evidence in this case that the picketing was for the purpose of coercing the employer to put pressure on the employees to join the Union, in violation of sec. 111.06 (2) (b), Stats.

Defendants attempt to distinguish the *Vogt Case* on the ground that there the picketing was on a country road patronized by only a small part of the public whereas in this case it took place in a city where the traffic by comparison is heavy. The fact that the picketing here would have more "advertising" value than it did in the *Vogt Case* does not require the conclusion that it was not meant as coercion of the employer. Under the circumstances the inference to be drawn was for the trial court; it properly concluded that the purpose was illegal.

The second question raised on appeal is whether, under the circumstances of this case, the state has jurisdiction. Appellants contend that interstate commerce is affected because 50% of the cost of the construction is for materials manufactured outside of the state, and that the National Labor Relations Act has pre-empted the field.

What we have here is the County of Door, an arm of the sovereign state of Wisconsin, entering into a contract for the construction of a building which is necessary and essential to the performance of its functions, a place where it can discharge its governmental responsibilities and en-

force laws, civil and criminal: It is significant that the National Labor Relations Act defines the term "employer" as follows:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . or any person subject to the Railway Labor Act . . ." Title 29, U. S. C. A., sec. 152 (2).

The Act further provides:

"The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." Title 29, U. S. C. A., sec. 152 (1).

From this it is evident that the state or any of its political subdivisions is not included within the purview of the National Act.

In *Teamsters Union v. N. Y., N. H. & H. R. Co.* (1956), 350 U. S. 155, 160, 76 Sup. Ct. 227, 100 L. Ed. 166 (the so-called "piggy-back" case), the United States supreme court said:

"The N. L. R. B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice. Sec. 10 (b), Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N. L. R. B. of jurisdiction over controversies otherwise within its competence solely because a railroad

is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by sec. 8 (b) (4) (A)."

The implication is that in the case of a political subdivision of a state, which is neither an "employer" nor a "person" under the Act, the N. L. R. B. has no jurisdiction.

Appellants rely on *Weber v. Anheuser-Busch, Inc.* (1955), 348 U. S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546, but in that case a strike was the basis of the conduct complained of and it is not applicable here. In *McCarroll v. Los Angeles County Dist. Coun. of Car.* (1957), ... Cal. ... 315 Pac. (2d) 322 (Cert. denied, March, 1958), it was held that (syl. 7):

"It is only strikes used as a weapon in bargaining process that are unfair labor practices within exclusive jurisdiction of National Labor Relations Board."

We are not unmindful of the fact that two of the plaintiffs, Zahn and Oudenhoven, are "employers" under the National Act. However, it is not reasonable to assume that Congress, in enacting the Act, intended in any way to interfere with the governmental function of a sovereign state or its municipalities. This is evident from the distinction made in the "piggy-back" case and from the fact that Congress expressly excluded states and their political subdivisions from its definition of "employer" and did not include them in its definition of "person."

Counsel amicus curiae have called our attention to the recent decision in *NLRB v. Electrical Workers Local 313*, 34 Labor Cases, para. 71,447, in which the Circuit Court of Appeals for the 3rd Circuit on April 17, 1958, affirmed a decision of the N. L. R. B. in which it found that a county

was a "person" within the purview of the National Act and entitled to protection from the activities proscribed by sec. 8 (a) (4) (A). The court said in its opinion:

"A governmental subdivision has no rights of its own; it is only an arm for carrying out the interest of the general public. If some individual or group of individuals has indulged in what the Congress has termed to be an unfair labor practice by which such entity is harmed we see no objection to the public interest being served by stopping the practice although not otherwise subjecting the municipal subdivision to the statutory obligations of an 'employer.' In other words, the majority of the Labor Board took the point of view consistent with recognized public policy.

"The point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.

"The order of the Board will be enforced."

We are in disagreement with this holding. It has long been held in this state:

"This raises for consideration the question whether a statute of general application containing no specific provision to the effect that the state is within it, applies to the state itself. It is universally held, both in this country and in England, that such statutes do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 687, 284 N. W. 580.

See, also, *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N. W. 642; *State v. Milwaukee* (1911), 145 Wis. 131, 129 N. W. 1101; *Sullivan v. School District* (1923), 179

Wis. 502, 191 N. W. 1020; *Fulton v. State Security and Investment Board* (1931), 204 Wis. 355, 236 N. W. 120.

In 82 C. J. S., Statutes, sec. 317, p. 554, the rule is stated as follows:

“Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested; and the rule applies, or applies especially, to statutes which would impair or divest the rights, titles, or interests of the government.

“The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.”

In 50 Am. Jur., Statutes, sec. 222, p. 199:

“In the process of construing Federal statutes, the general rule is that established rules for the construction of statutes prevail. However, it is a general principle to favor such construction of Federal statutes as would give them a uniform application throughout the nation. Moreover, in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests, in the Federal scheme must always be in the background. Federal legislation cannot be construed without regard to the implications of the dual system of government in the United States. The courts should exercise great wariness in the construction of a statute where the problem of construction implicates a phase of federalism and involves striking a balance between national and state authority in a sensitive area of government.” See cases there cited.

In *Palmer v. Massachusetts* (1939), 308 U. S. 79, 83, 60 Sup. Ct. 34, 84 L. Ed. 93, in an opinion by Mr. Justice Frankfurter, the United States Supreme Court said:

“Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities, unless Congress gave it. And so we have one of those problems in the reading of a statute where in meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.”

And in *Trade Comm'n v. Bunte Bros.* (1941), 312 U. S. 349, 351, 61 Sup. Ct. 580, 85 L. Ed. 881, in another opinion by Mr. Justice Frankfurter:

“To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases*, 230 U. S. 352, 398-412.”

By the Court: Judgment affirmed.

CONCURRING OPINION.

WISCONSIN SUPREME COURT.

(Formal Parts Omitted.)

Currie, J. (concurring.) There would seem to be no question but that, if it were not for Door county being a party plaintiff, there would be federal pre-emption here, and state action would be precluded under Wisconsin *E. R. Board v. Chauffeurs, etc., Local 200* (1954), 267 Wis. 356, 366, 66 N. W. (2d) 318. This is because, as pointed out in such case, secs. 158 (a) (3) and 158 (b) (2), 29 USCA, comprising part of the Taft-Hartley amendments to the National Labor Relations Act, make illegal the same type of union activities, where interstate commerce is involved, as does sec. 111.06 (2) (b), Wis. Stats.

The majority opinion grounds its holding, that there is no federal pre-emption, upon the fact that Door county is not a "person" within the definition of such term as used in the National Labor Relations Act. Such definition is to be found in sec. 152 (1), 29 USCA.¹ The statute material to the present controversy is sec. 160 (b), 29 USCA, which covers the issuance of a complaint by the National Labor Relations Board charging an unfair labor practice after charges have been filed with such board and an investigation has been made thereof. While the word "person" is employed by such section in describing against whom a complaint is to be issued, such word is not used to describe or limit who may file a charge which may result in the issuance of a complaint.

There is nothing in the National Labor Relations Act which would have precluded Door county from filing a

¹ "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

charge against the instant defendants with the National Labor Relations Board. This is pointed out in the dissent filed by Mr. Justice Fairchild. Therefore, it cannot be held that congress has failed to pre-empt the field because the definition of the word "person" in the National Labor Relations Act does not embrace a state, or an instrumentality thereof such as a county.

However, there is another basis upon which the judgment below may be sustained. A county is an arm or agency of the state and in the erection of a courthouse, or addition thereto, it is engaged in a governmental function. *Green County v. Monroe* (1958), 3 Wis. (2d) 196, 87 N. W. (2d) 827. Under our federal system of government it is implied in the United States constitution that the national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary function of government. Mr. Justice Brewer, in *South Carolina v. United States* (1905), 199 U. S. 437, 451-452, 26 Sup. Ct. 110, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress may pre-empt the field of labor relations as they may affect interstate commerce, the courts of the state

under the principle of *South Carolina v. United States*, *supra*, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith. Both federal and state statutes make the defendants' activities illegal under the findings of fact of the trial court. We would have an entirely different problem if congress had legislated that all peaceful picketing of an employer, who is engaged in a business affecting interstate commerce, is a valid activity not subject to being enjoined by any court.

The trial court, in addition to finding the activities of the defendants illegal under sec. 111.06 (2) (b), also found that the same violated sec. 103.535 because no "labor dispute" existed under the definition of such term set forth in sec. 103.535. Sec. 103.535 is clearly unconstitutional and void under *American Federation of Labor v. Swing* (1941), 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, and *Waukesha v. Plumbers & Gas Fitters Local* (1955), 270 Wis. 322, 71 N. W. (2d) 416. See also *Milwaukee Boston Store Co. v. Amer. Fed. of H. W.* (1955), 269 Wis. 338, 356-357, 69 N. W. (2d) 762. However, the finding of a violation of sec. 111.06 (2) (b) is sufficient to sustain the judgment below.

For the reasons stated herein I concur in the result.

DISSENTING OPINION.

(WISCONSIN SUPREME COURT.)

(Formal Parts Omitted.)

Fairechild, J. (dissenting). In my opinion the circuit court lacked jurisdiction to enjoin the conduct of appellant union and the judgment ought to be reversed. The peaceful, orderly, one-man, truthful picketing was entirely law-

ful unless motivated, as found by the court, to halt construction "to attempt to coerce the plaintiff Arnold G. Zahn to force his employees to organize into a union shop or, in the alternative, to force . . . Zahn to release his contract with the plaintiff County of Door."

The union's conduct affected interstate commerce. This appears from the stipulated fact that material valued at \$225,000, manufactured outside Wisconsin, was to be used. The issue of whether the union's conduct was so motivated as to be wrongful was within the exclusive jurisdiction of the National Labor Relations Board. *Wisconsin E. R. Bd. v. Chauffeurs, etc., Local 200* (1954), 267 Wis. 356, 366, 66 N. W. 2d 318. Congress has pre-empted the field as to conduct with which the national act expressly deals. *Guss v. Utah Labor Board* (1957), 353 U. S. 1, 9.

The majority opinion appears to be based upon the proposition that conduct which would be an unfair labor practice under the federal act can be enjoined by a state court if an arm of the state seeks that relief because of damage to its interests. I respectfully conclude that this view is in error in two respects:

(1) It is based upon an assumption that the county is disqualified, under the national act, from arousing the jurisdiction of the national board by filing a charge. Whence does this disqualification arise? It is not from the statute itself, but from a regulation adopted by the national board which provides that a charge may be filed by "any person." Concededly the national act defines "person" in a way that does not expressly include an arm of a state. Nevertheless the only *statutory* pre-requisite to issuance of a complaint by the board is that an unfair labor practice be "charged."

(2) The majority reasons that if a county cannot file a charge with the national board, conduct which would be

an unfair labor practice affecting interstate commerce may be dealt with by a state court upon complaint of the county. It must be true that the identical conduct is also within the jurisdiction of the national board because Zahn, the employer, and other interested persons, would clearly be qualified to file a charge with the national board. There are issues of fact and law. Opposite and conflicting results could be reached in the two fora. Congress did not intend that result.

The picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the national act. If mass picketing or violence or overt threats of violence were involved, state action to prevent those things would appear to be proper. *Auto Workers v. Wisconsin Board* (1956), 351 U. S. 266, 274. But with violence absent, and an effect upon interstate commerce present, then the matter is wholly in the field which is now held to be preempted by Congress, and entrusted exclusively to the jurisdiction of the national board.

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APPENDIX "C."

JUDGMENT AND ORDER FOR PERMANENT
INJUNCTION.

(Formal Parts Omitted.)

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates and all of the officers and members of said defendant labor organization, be perpetually enjoined and restrained from picketing, or perpetrating any action amounting to picketing, on the job site known as the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Dated this 23rd day of October, 1957, at Green Bay, Wisconsin.

By the Court:

/s/ Arold F. Murphy,

Arold F. Murphy,

Judge Presiding